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# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 27

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F. J. GUNTHER,

*Petitioner,*

vs.

SAN DIEGO & ARIZONA EASTERN RAILWAY  
COMPANY, a corporation,

*Respondent.*

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## Answering Brief of Respondent on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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### STATUTES INVOLVED

In addition to the Statutes cited by Petitioner, this case involves Section 6 of the Railway Labor Act (48 Stat. 1197), which is printed in Appendix A hereto.

### QUESTION PRESENTED

The question presented is whether medical arbitration of Petitioner's physical condition can be imposed upon Respondent by the National Railroad Adjustment Board under Section 3 of the Railway Labor Act where there is no

agreement providing for arbitration or limiting the Respondent's right to determine in good faith the physical fitness of locomotive engineers.

A subsidiary question is whether the District Court acted within its discretion when it denied Petitioner's motion to vacate the judgment in order to introduce evidence, because the evidence would not contradict the facts essential to the judgment and also because the evidence could have been discovered by the exercise of due diligence.

### STATEMENT OF THE CASE

Believing Petitioner's "Statement of the Case" (its brief, pp. 7-30) to contain extensive irrelevant and immaterial matter, Respondent San Diego & Arizona Eastern Railway Company (hereinafter referred to as SD&AE, Respondent, railroad or carrier) submits the following as its statement:

Petitioner Gunther (hereinafter referred to as Petitioner) was employed by SD&AE as a locomotive engineer until December 30, 1954, shortly after his seventy-first birthday,<sup>1</sup> when the medical doctors of the railroad determined that his heart was in such condition that he would be likely to suffer an acute coronary episode (R. 2, 32, 33, 41-42). He was disqualified from active service of operating trains and it was suggested that he take his pension. Petitioner contends that this action of SD&AE violated his rights under the collective bargaining agreement (hereinafter referred to as Agreement) between the locomotive engineers represented by the Brotherhood of Locomotive Engineers (here-

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1. Long standing SD&AE safety requirements were and are that locomotive engineers must take and pass periodic physical examinations (R. 40-41). An engineer who reaches age 70 in service must be so examined every 90 days. Petitioner took these examinations regularly until December 30, 1954, when the physicians found the disqualifying coronary condition (Pet. Br. 12-13).

inafter referred to as BofLE) and SD&AE (R. 2). Nowhere does he challenge the competence, good faith or wisdom of the decision of these doctors or the fairness of the standard of fitness used and applied to his physical condition or the adequacy of the medical determination (R. 1-7).

Petitioner sought and obtained an award of the National Railroad Adjustment Board (hereinafter referred to as Adjustment Board or Board)<sup>2</sup> requiring the utilization of a three-doctor panel to arbitrate the question as to Petitioner's disability and the propriety of his removal from service notwithstanding the opinion of the railroad medical staff (R. 6-7). The Adjustment Board said:

"Carrier contends that . . . there is no rule [in the collective bargaining agreement covering locomotive engineers] permitting the appointment of a neutral medical board as here sought [by Mr. Gunther] and that the decision of the chief surgeon that claimant is not physically qualified for service is not subject to review.

" . . .

"If carrier through its medical staff has removed an employee from service in good faith, on the basis of a fair standard of fitness, applied to his physical condition, adequately determined, there is no right to reinstatement. Otherwise he has been wrongfully removed from service." (R. 6) (Clarifying words added in brackets).

No inquiry was made by the Adjustment Board or by the three-doctor board into the question of good faith of SD&AE

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2. Bi-partisan tribunal established in Section 3 of the Railway Labor Act (45 U.S.C. § 153) to make findings and awards on disputes between employees and carriers growing out of grievances or out of the interpretation or application of collective bargaining agreements. The instant case involves a purported award of the First Division which has jurisdiction over operating employees and reference to Adjustment Board in this brief refers to that Division.

and the medical staff, fair standard of fitness or adequacy of the determination and there was nothing in the record showing or suggesting any such deficiency (R. 5-11). Instead of discussing the fact alleged by the SD&AE that there was no Agreement rule providing for arbitration, the Board declared in the 1956 Award:

"... it has not been unusual, where adequate showing has been made of ground for challenge of carrier's decision for the Division [Adjustment Board] to provide for a neutral board of three qualified physicians, ..." (R. 6) (Words in-brackets added).

In the later "Interpretation" of October 8, 1958, the Board again made no reference to any inadequacy or lack of good faith which it said was the test of the validity of the disqualification of Petitioner for safety reasons in its October 2, 1956, award. The Adjustment Board simply recited that a majority of the three doctors on the arbitration panel did not support the decision of Respondent's Chief Surgeon (R. 10). Basing its decision on this purported finding the Adjustment Board ordered Respondent SD&AE to reinstate Petitioner with back pay (R. 11).

Thereupon SD&AE refused to reinstate Petitioner to active service to the position of locomotive engineer with back money payment on the basis that the purported award and Interpretation were void and in excess of the jurisdiction of the Adjustment Board (R. 34-35). Petitioner filed the instant enforcement proceeding under the provisions of Section 3, First (p) of the Railway Labor Act (45 U.S.C. § 153, First (p)) contending that the said removal "from active service on the ground that he was not physically qualified to perform the duties of a locomotive engineer" imposed retirement in violation of Petitioner's seniority rights under the Agreement (R. 2).

SD&AE filed a motion for summary judgment supported by affidavits (R. 12-21) setting forth the context of the

Agreement and all of its pertinent provisions as of December 30, 1954, the date of Petitioner's disqualification. The exhibits to the affidavit filed on behalf of SD&AE include the demand of the BofLE<sup>3</sup> dated August 28, 1959, for the adoption of a three-doctor medical arbitration panel in this same collective bargaining Agreement (R. 20-21), together with the resulting Agreement provision effective December 1, 1959 (R. 17-19). Prior to 1959 there was no provision in the Agreement for such a review procedure. (R. 14, 41, 60). The collective bargaining Agreement has provided for such an arbitration with respect to the physical condition of a locomotive engineer from and after December 1, 1959, which was approximately five years after Mr. Gunther's physical disqualification. These facts were not controverted by Petitioner. SD&AE's motion for summary judgment was based on three grounds: (I) the April 8, 1959, judgment in the first Gunther enforcement action is *res judicata* (R. 24-28; Preliminary opinion in 161 F.Supp. 295); (II) more than two years expired between October 2, 1956, the date of the first Adjustment Board Award and Order (R. 5-8),<sup>4</sup> and the

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3. Railroad Labor organization certified under Section 2 Ninth of the Railway Labor Act (45 U.S.C. § 152 Ninth) to represent the craft of locomotive engineers employed by SD&AE. It happens that Mr. Gunther at all times material hereto was and is General Chairman of the Brotherhood of Locomotive Firemen and Enginemen and actively represents member locomotive firemen and engineers in the application of both the instant Agreement and also the agreement covering firemen on SD&AE. His claim in the case at bar is based upon his own employment as a locomotive engineer under the Agreement covering that craft on SD&AE. He was thoroughly familiar with the Agreement and its interpretation and application by the parties in the operations of SD&AE (Pet. Br. 21).

4. The second action of the Adjustment Board (R. 9-11) is entitled "Interpretation" and declares (R. 10): "The issue of fact upon which the prior Award 17646 was conditioned having been determined in favor of claimant, said conditional award should be made absolute and final and the claim sustained as therein pro-

date of filing the case at bar, September 26, 1960, which exceeds the two-year statutory period in Section 3, First (q) of the Railway Labor Act (45 U.S.C. 3, First (q)); and (III) a purported Award of the Adjustment Board issued without jurisdiction is void and unenforceable. The District Court denied the motion without prejudice to a subsequent renewal on Ground No. III.

Thereafter SD&AE filed its answer (R. 32-37).<sup>5</sup> One month later SD&AE renewed its motion for summary judgment based upon the ground that the Adjustment Board had exceeded its jurisdiction (R. 38-39). This motion was granted and was thereafter affirmed by the Court of Appeals for the Ninth Circuit (R. 226-235). It is now before this Court for review.

At all times in this proceeding Respondent SD&AE has consistently pointed to the written Agreement and sworn affidavits supporting its position that there is no provision in the Agreement for review or arbitration of the decisions of its medical doctors made upon adequate examination and in good faith. Its position is buttressed by the additional fact that the BofLE, party to the Agreement, made a demand (R. 20-21) upon Respondent SD&AE five years later under Section 6 of the Railway Labor Act (45 U.S.C. 156) for such an arbitration clause which resulted in amending

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vided." Although the enforcement action brought by Mr. Gunther upon said first Award 17646 was pending at the time when the Interpretation Award 17646 was issued, his refusal to introduce the same into the proceeding before final judgment was pleaded in SD&AE's answer in the instant case (R. 34) and was discussed in the opinion of the District Court (R. 56).

5. The answer contains seven separate affirmative defenses, including *res judicata*, bar of the statute of limitations and failure of the Adjustment Board to afford SD&AE notice of the proceedings or opportunity to be heard or represented as required by the Fifth and Fourteenth Amendments to the Constitution and Section 3 First (j) of the Railway Labor Act (45 U.S.C. 153, First (j)).

the Agreement in 1959 (R. 17-19). Petitioner claims that in December 1954 the Agreement contained a three-doctor arbitration provision or limitation upon the right of the Respondent to rely in good faith upon its Chief Surgeon's advice concerning physical condition. The District Court on many occasions admonished Petitioner to point to at least some evidence of such a limitation (R. 30, 233). He failed to specify or offer any such evidence throughout either the first or second cases or at all prior to judgment (R. 30, 215).

After the instant case was on appeal Petitioner, with approval of the Court of Appeals, moved the District Court to reopen the case and set aside the judgment under FRCP Rule 60(b) (R. 103-105). The District Court heard the motion after remand and in its Order Denying the Motion dated April 10, 1963, found that the evidence purporting to show the existence of a medical arbitration panel under the Agreement consisted of letters dated 1944 through 1947 to the effect that interpretations of rules in one agreement would also apply to "similarly worded rules" in the instant Agreement but no "similarly worded rules" were shown to exist (R. 216-217); that the letters would have been printed as a part of the booklet Agreement of 1938 (green cover; R. 15—documentary exhibit attached to page 266 of original record) (R. 210, 215) as reprinted in 1956 (orange cover) (R. 215) in accordance with Petitioner's description of the prevailing practice relating to the printing of agreements (R. 106-107); and that in any event Petitioner has no valid excuse for lack of due diligence in failing to discover and produce the letters prior to final judgment dated October 27, 1961 (R. 214, 234). Petitioner was thoroughly familiar with the Agreement, practices and customs on the railroad (R. 52), and he, as a union representative, handled with SD&AE disputes over the applica-

tion of the Agreement (covering locomotive engineers) on behalf of other employees (R. 52) and was "thoroughly familiar with said Agreement and its interpretation and application by the parties thereto in the operations of defendants" (Pet. Br. 21 par. 6). Moreover, Petitioner gave written authorization to the BoFLE and its general chairman on SD&AE (Mr. J. P. Colyar, R. 168-170) to act as his (Mr. Gunther's) representative in handling the instant case. This authorization was effective March 28, 1960, approximately six months before September 26, 1960, when the instant action was filed (R. 1). In light of the uncontroverted facts thus set forth, the District Court denied the motion for relief from judgment on March 29, 1963 (R. 218-219). The Court of Appeals for the Ninth Circuit affirmed on September 4, 1964 (R. 226-235).

In particular reference to Petitioner's statement of the case (Pet. Br. 7-30), it should be noted that there is no clear separation between the facts occurring prior to the judgment of October 27, 1961 (R. 97) and those relating to the motion for relief under FRCP Rule 60(b) from the judgment which was filed on June 4, 1962 (R. 103).<sup>6</sup> Without any implication with respect to Petitioner or his brief, this is simply noted to emphasize the fact that at all times prior to the motion under FRCP Rule 60(b) there was no indication of any evidence which would support an appeal from the decision of the SD&AE medical staff to a three-doctor medical arbitration panel under the controlling Agreement. Many of the references to facts in Petitioner's statement of

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6. As Petitioner himself states (Pet. Br. 6), if an evidentiary item was available to the District Court before judgment in this case it will bear a record page number between 1 and 97. Post judgment materials bear the record number herein of 98 to 237.

FRCP refers throughout this brief to Federal Rules of Civil Procedure (28 U.S.C.).

the case are to evidence relating to the 1944-1947 letters which he was not permitted to introduce for the first time in 1962 for reasons set forth in the opinion of the District Court (R. 214-215, 217). Thus the references to rivalry between the BofLE and Brotherhood of Locomotive Firemen and Enginemen (Pet. Br. p. 8) have nothing to do with any issue in the case excepting his purported excuse for not presenting the 1944-1947 letters prior to his 1962 motion.<sup>7</sup>

Similarly, the material appearing on pages 11 and 12 of Petitioner's brief, which is designated by references to record numbers above page 98, involves the letters of interpretation of 1944-1947 which were not before the court prior to the judgment of October 27, 1961. The material appearing on page 26 through the middle of page 29, inclusive, of Petitioner's brief also pertains to the subsequent motion for relief from judgment filed in June of 1962 (R. 103).

The District Court found no evidence in the applicable collective bargaining Agreement, in any amendment thereto or in any custom or practice thereunder of any limitation on the right and duty of SD&AE to determine in good faith the physical capacity of its locomotive engineers and to disqualify them from operating locomotives when its doctors find a disabling condition such as a coronary impairment (R. 79, 215, 218). It was further determined that prior to 1959 there was no applicable agreement provision for the arbitration of such decisions of railroad physicians (R. 215). Having concluded that the Adjustment Board exceeded its jurisdiction by ordering a three-doctor arbitration panel in this case without Agreement support, the Court granted summary judgment (R. 97). Thereafter a

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7. As explained above, no significance attaches to such evidence since he authorized the BofLE in writing to represent him in this matter some six months before filing this action (R. 168-169).

hearing was held pursuant to FRCP Rule 60(b) upon Petitioner's motion to vacate the judgment in order to submit what he characterized as "newly discovered evidence." On April 10, 1963, the District Court denied the motion (R. 207, 218-219). The Court of Appeals for the Ninth Circuit affirmed (R. 226-235). On March 1, 1965, this Court granted certiorari (R. 237).

### **SUMMARY OF ARGUMENT**

This case presents the issue whether the National Railroad Adjustment Board is empowered under the Railway Labor Act (45 U.S.C. § 151 et seq.), without any support in the collective bargaining Agreement, to impose upon the parties an arbitration for the review of the decision of medical doctors disqualifying a locomotive engineer from operating an engine. The decisions of the courts below should be affirmed on the basis that an award in favor of Petitioner should not be enforced under Section 3, First (p), of the Railway Labor Act (45 U.S.C. § 153, First (p)) because the Adjustment Board exceeded its jurisdiction; and further, the findings in the award do not support the order.

### **I**

The undisputed facts which are material to this issue show that summary judgment was properly granted under FRPC 56 (28 U.S.C.). Petitioner was removed from active service in good faith on a medical determination that his physical condition rendered his operation of locomotives unsafe. There was no rule in the Agreement limiting SD&AE in taking action upon such determinations or providing for any review or arbitration thereof. While the Adjustment Board's findings noted no such provision, it

ordered a medical arbitration panel and accepted the decision thereof as its own award.

The Adjustment Board cannot lawfully use its power under Section 3 of the Railway Labor Act (45 U.S.C. § 153) to interpret and apply Agreement provisions as a means of creating new limitations on the rights and duties of the parties. Instead Section 6 of the Act (45 U.S.C. § 156) must be used for that purpose, in the manner in which it was used in this case in 1959.

## II

This case is not similar to the situation where an Adjustment Board award contains findings interpreting the collective bargaining agreement in a somewhat vague and indefinite manner. The courts are receptive to the enforcement of such awards within reasonable limits. *Kirby v. Pennsylvania R.R.*, 188 F.2d 793 (3rd Cir. 1951); *Hodges v. Atlantic Coast Line R.R.*, 310 F.2d 438 (5th Cir. 1962). The award in the instant case does not find that the Agreement was violated or that it provides for arbitration (R. 5-11). The order based thereon is void and unenforceable. Both *Kirby* and *Hodges* contained findings that the basic Agreement had been violated. *Hodges* had never had a physical examination at all; and the Court of Appeals ordered a medical examination, subject to arbitration, to provide the Board with a medical examination for its use but not for it to substitute the findings for its own decision. There must be facts disclosed in the findings upon which an award could be based. *Railroad Yardmasters v. Indiana Harbor Belt R.R.*, 166 F.2d 326 (7th Cir. 1948), 45 U.S.C. § 153, First (p).

## III

The federal law applicable to the enforcement of arbitration contracts under the Labor Management Relations Act, 1947 (29 U.S.C. § 185), is that all intendments are in favor of arbitration. The parties have agreed to arbitration and are regarded as having intended this result. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). The latter case specifically recognizes that an arbitrator is confined to the interpretation and application of the collective bargaining agreement, and enforcement will be refused where his words show an infidelity to this obligation. Since airline cases under the Railway Labor Act involve consensual arbitration and are not subject to Section 3, First (p) (45 U.S.C. § 153, First (p)), they are not in point with the instant situation.

## IV

Section 3, First (p) of the Railway Labor Act (45 U.S.C. § 153, First (p)), requires that the findings and order of the Adjustment Board are prima facie evidence of the facts stated therein, but that the findings must be stated and must be consistent with the order. The instant findings do not meet this requirement. Even if they did, the award was subject to review in the statutory manner with a trial "de novo". *Locomotive Engineers v. Louisville & N. R.R.*, 373 U.S. 33 (1963); *Russ v. Southern Ry.*, 334 F.2d 224 (6th Cir. 1964), *cert. denied*, 379 U.S. 991, *rehearing denied*, 380 U.S. 938.

## V

Where a motion is made under FRCP Rule 60(b) (28 U.S.C.) to vacate a judgment entered eight months earlier to permit the production of "newly discovered" evidence,

denial of the motion is not an abuse of discretion where the affidavits of the parties disclose that the evidence would neither contradict established material facts nor otherwise change the conclusion of the court. In addition, the court may properly exclude such evidence if it could have been discovered with due diligence before judgment was entered. In the instant case, Petitioner's representative was actually in possession of the purported evidence six months before the complaint was filed and more than two years before the notice of this motion was filed. This is neither an abuse of the court's discretion nor prejudicial to Petitioner in the circumstances.

### **ARGUMENT**

#### **I. The Undisputed Facts Disclose the Imposition of Arbitration by the Adjustment Board Without Consent of the Parties and Fully Support the Entry of Summary Judgment.**

##### **A. The Adjustment Board Exceeded Its Jurisdiction.**

Petitioner contends in court, as he did before the Adjustment Board, that his rights under the seniority and discharge provisions of the Agreement were violated when SD&AE removed him on December 30, 1954, at age 71, from active service as a locomotive engineer. It has been clearly established, without any challenge, that SD&AE took this action for safety reasons upon the medical advice of its doctors that his heart was in such a condition that he might suffer an acute coronary episode (Pet. Br. 12-13; R. 14-15). Since summary judgment was rendered against him, he has moved the court to consider alleged evidence of the existence of a medical arbitration panel which has been in the possession of his own representative through written power of attorney since at least six months prior to the filing of the instant suit (R. 168-170, 214). SD&AE has presented undisputed evidence that there was no pro-

vision in the collective bargaining agreement limiting its right to disqualify locomotive engineers on the basis of the recommendations of its medical doctors (R. 215). In *Wilburn v. Missouri-Kansas-Texas R. Co. of Texas*, 268 S.W. 2d 726 (Ct. of Civ. App. of Texas—1954) the court considered the claim of a railroad employee that he was wrongfully discharged when he was disqualified upon examination by the company doctor. He demanded a three-doctor panel which was refused. No such panel was contained in the agreement at the time or at all until February, 1950. The court held that plaintiff had no cause of action for wrongful discharge under the agreement, saying at page 734:

“... There is a wide difference between a discharge because of affirmative action and a disqualification on account of physical disability as expressed in the contract which has been plead by plaintiff.”

Three undisputed evidentiary items are substantially conclusive on this point: (1) that the printed Agreement of 1938 included all interim understandings as of the date of its issuance and contained no such limitation (R. 141); (2) that the printed Agreement of 1956 (orange-colored cover) included all interim understandings as of the date of its issuance and contained no such limitation<sup>8</sup> (R. 215,

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8. The Agreement between SD&AE and BofLE covering locomotive engineers was reprinted at intervals so as to include all agreed provisions, understandings and supplements as of the date of printing (R. 106). While Petitioner's brief at page 11 quotes only a portion of this paragraph in Mr. Colyar's affidavit appearing on R. 106-107, he omits the significant point that the 1938 (green cover) and 1956 (orange cover) printings of the Agreement contained all of the terms on those dates, including all “changes in and additions to the terms of said agreements subsequent to such [previous] printing” (word in brackets added for clarification). Other undisputed evidence confirms the absence of a three-doctor panel provision: BofLE letter from Mr. Colyar dated January 26, 1955, preliminary to reprint of Agreement in 1956 (orange cover) reads (R. 195): “In order to bring it up to date, the settlements and

141, 145); and (3) that in 1959 a demand under Section 6 of the Railway Labor Act (45 U.S.C. § 156) was made upon SD&AE by the BofLE to adopt such a clause in the Agreement (R. 20, 21) and thereafter on November 3, 1959, an amendment was made to the Agreement providing for such a medical arbitration to become effective December 1, 1959 (R. 17-19). The findings of the Adjustment Board specifically recognize the right of the SD&AE to disqualify a locomotive engineer from active service in good faith on the advice of its medical staff (R. 6). The Adjustment Board made no finding of or reference to any Agreement rule establishing a three-doctor board review of such a decision (R. 5-11). The Adjustment Board proceeded to order the arbitration without regard to the lack of consent of the parties. The subject of arbitration was to determine at a date not earlier than October, 1956, whether at least two out of three doctors would agree with the opinion of the SD&AE medical staff rendered in 1954 when Petitioner was under the continual strain of operating trains. Thus, the Adjustment Board itself, in interpreting the Agreement, pointed to the right asserted by the SD&AE before it arbitrarily referred the matter to the three-doctor panel on the above question (R. 6) and substituted the judgment of the panel for its own in the case (R. 7, 10).

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agreements set forth hereafter should be applied to present rules or corrections made, whichever is applicable. . . . *Article 35—No Change. . . .*" (R. 200). The medical arbitration provision was incorporated in the Agreement for the first time in 1959 as follows: "It is hereby understood and agreed that *Section 1, Article 35 . . . . is amended by adding the following thereto . . . .*" (R. 17-21). The District Court queried counsel for Petitioner at the hearing as to why the provision did not appear in the 1956 (orange cover) reprint if in fact it was added by means of the 1944-1947 letters or otherwise and the answer was: "A reasonable inference to be drawn for its omission from the orange-covered booklet as of January 1, 1956, is that it was inadvertently omitted by those charged with the responsibility of seeing that all existing contractual provisions were incorporated there" (R. 215). (Emphasis Added.)

At no time was an agreement to arbitrate mentioned. The Adjustment Board exceeded its jurisdiction under Section 3 of the Railway Labor Act (45 U.S.C. § 153—reproduced in Pet. Br. Appendix A, pages ix-xix) in requiring non-consensual arbitration. As we have shown above, Section 6 of the Railway Labor Act (45 U.S.C. § 156) provides for the making and changing of agreements.<sup>9</sup> Section 6 was utilized by these parties in 1959 in this precise situation. If agreement rights can be swept away or conferred by fiat of a particular referee (neutral member) of the Adjustment Board, the next case may well result in the denial of medical arbitration which the BofLE obtained in 1959. This type of ruling on the part of the Board would completely unstabilize the contractual relations between the railroads and their employees. Section 6 should be retained for making and changing agreements. Section 3 should be utilized solely for interpreting and applying the provisions of such agreements.

**B. Summary Judgment Did Not Prejudice Petitioner and Was Proper.**

It is submitted that the disposition of this case upon motion for summary judgment under FRCP Rule 56 was correct and proper. One of the principal affirmative defenses in the answer was this challenge to the jurisdiction of the Adjustment Board when it imposed arbitration upon the parties (R. 36). At the instance of Petitioner, the Board interpreted the agreement in light of its seniority provisions. Its findings were that if the SD&AE removed Petitioner from active service in good faith reliance upon the advice of its medical staff, he is not entitled to have his claim sustained (R. 6). No finding of bad faith was made. No one has challenged the good faith of SD&AE either

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9. Section 6 is quoted in the Appendix to this brief.

before the Board or in Court. The so-called "Interpretation" award simply incorporated the additional finding of the medical arbitration panel that Petitioner had no physical defects which would prevent him from operating engines two years theretofore (R. 10). The purported order of October 8, 1958, was based on mandatory arbitration and, further, was contrary to the findings. The question is a legal one based upon undisputed facts. Petitioner was not prejudiced in any way by the proceedings. The SD&AE affidavits presented competent, material facts as required by FRCP Rule 56 showing that no such Agreement provision existed. Petitioner contended that the seniority and discharge provisions prevented his compulsory retirement or removal from active service when his own doctor disputed the opinion of the SD&AE medical staff. But he did not and could not point to any provision in the Agreement substituting other opinions for that of the Chief Surgeon as to the physical qualification of a locomotive engineer. On several occasions the District Court indicated to Petitioner that he should specify some evidence of any understanding, custom, practice or other basis for his contention that the decision of the Chief Surgeon is reviewable in the absence of a claim of bad faith (R. 30-31, 79, 208, 215, 217). Petitioner has had extensive periods of time in which to discover, analyze and point to any such evidence if in fact the SD&AE affidavits were incorrect. There was no reason why Petitioner could not search the BofLE files at least six months before he filed this action because the BofLE has held his written authorization to represent him from and since March 28, 1960 (R. 168-169). The petition herein was filed September 26, 1960 (R. 4). The first motion of SD&AE for summary judgment was filed on November 28, 1960, supported by affidavits declaring that there was no provision for review of the Chief Surgeon's determination

(R. 12-13). The motion was denied on March 27, 1961, and the Court said: "Counsel for the petitioner, however, has filed no affidavit to show what parol evidence he deems important, nor, for that matter has he pointed out in what particulars the contract may be ambiguous." (R. 30) ". . . If other matters are to be passed upon, let them be presented in proper form" (R. 31). The answer was filed on April 24, 1961 (R. 32). On May 16, 1961, SD&AE filed its second motion for summary judgment (R. 38) supported by affidavits again demonstrating the foregoing particular facts (R. 40-42). Petitioner's opposing affidavit explained the operation of seniority, but made no reference to physical disqualification or review of decisions of the doctors and ignored the above-quoted indications of the District Court that he would be called upon to point to some evidence of the alleged limitation (R. 52-54). Further detail of the events in this case appears in the Opinion of the District Court dated September 27, 1961 (R. 56-67). Throughout the period of one year from filing the petition until the granting of summary judgment, Petitioner did not point to any evidence to contradict the affidavits of SD&AE. It is incumbent upon the opposing party to disclose what the evidence will be to establish a genuine issue of fact. He may not hold back his evidence until trial. *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469 (2nd Cir. 1943); *Surkin v. Charteris*, 197 F.2d 77, 79 (5th Cir. 1952); *Gifford v. Travelers Protective Assn.*, 153 F.2d 209 (9th Cir. 1946); *Orvis v. Brickman*, 196 F.2d 762 (D.C. Cir. 1952). In 6 Moore's Federal Practice (2d Ed.) this principle is discussed as follows (p. 2130):

"And although the moving party be unaided by any presumption, when he has clearly established certain facts the particular circumstances of the case may cast a duty to go forward with controverting facts

upon the opposing party, so that his failure to discharge this duty will entitle the Movant to Summary Judgment."

At page 2131 this authority states:

"To defeat a movant who has otherwise sustained his burden within the principles enunciated above, the party opposing the motion must present the facts in proper form—conclusion of law will not suffice; . . ."

The case was properly decided on the undisputed facts.

## II. The Adjustment Board Cannot Require Arbitration or Change the Agreement Under the Guise of Interpretation.

At page 45 of his brief, Petitioner states: "The *ultra vires* doctrine had its inception in a dictum in *Hunter v. Atchison, T. & S.F. Ry.*, (CA 7, 1948) 171 F.2d 594" and he quotes a portion of the case as follows:

"The *ultra vires* doctrine has its inception in a dictum in *Hunter v. Atchison, T. & S.F. R. Co.* (CA 7, 1948) 171 F.2d 594, a suit by a group of train porters to enjoin the implementation of an award issued in a proceeding to which they were not a party. In affirming the grant of injunctive relief the court of appeals said—

" . . . In reality what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new and different contract between the brakemen and the carrier.

" . . .

"While we are of the view that the Award is void because the Board exceeded its authority, we place our decision primarily upon the ground that it was made without notice to the porters, as the statute requires, and that their constitutional right to a hearing was denied." (171 F.2d 594, 599.)"

The Court affirmed an injunction against the Adjustment Board and the Santa Fe Railroad from making effective an award giving the trainmen certain passenger braking duties which had been performed by train porters for many years. The award was based on an interpretation which was not sustainable on the facts. At page 599, the Court of Appeals declared that while it was of the view that "... the Award is void because the Board exceeded its authority," its decision was primarily on the basis of lack of notice required by Section 3, First (j) of the Railway Labor Act (45 U.S.C. § 153, First (j)). In the preceding paragraph on page 599, the Court also said:

"... In reality, what the Board did was not merely to exercise its statutory authority to interpret and apply the contract as it existed but to make a new and different contract between the brakemen and the carrier. We think the five members of the Board who dissented from the Award properly characterized the action of the majority when they stated in their dissenting opinion: 'The lesson of the award is that contracts may be altered, changed, or amended, in plain violation of the Railway Labor Act, merely by the assertion of a claim which has no foundation for support in the agreement. That these are the correct conclusions to be drawn from the wanton usurpation of power by the majority which voted for the award, is adequately fortified by the undisputed facts of record which were before us.'"

At page 46 of his brief, Petitioner indicates that the foregoing was repeated in *Thomas v. New York, C. & St. L. R.R.*, 185 F.2d 614 (6th Cir. 1950). While the Court did not cite *Hunter* (171 F.2d 594), *supra*, it came to the conclusion suggested therein, saying at page 616:

"... Appellant was entitled to reinstatement only if wrongfully discharged; he was wrongfully discharged

only if some right arising out of contract or the law was violated by his discharge."

And at page 617:

"... While the Board [Adjustment Board] under the statute has jurisdiction to hear an individual grievance, it is not authorized to write a contract for the parties nor to create substantive legal rights."

See, in accord, *Southern Pac. Co. v. Joint Council Dining Car Employees*, 165 F.2d 26 (9th Cir. 1947), *cert. denied*, 333 U.S. 838 (1948), in which the references to Board jurisdiction appear in Footnote 2; *Munhollon v. Pennsylvania R.R.*, 180 F.Supp. 669, 673 (N.D. Ohio 1960). Petitioner further contends at page 46 of his brief, that limitation of the Adjustment Board's jurisdiction to the interpretation and application of agreements is questionable because of the language of the statute, which reads:

"(i) The disputes between an employee . . . and a carrier . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . may be referred by petition of the parties . . . to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (45 U.S.C. § 153, First (i)).

Petitioner's claim to the Adjustment Board and his contention in court demonstrate that his grievance is solely a dispute over the interpretation or application of the collective bargaining Agreement. Paragraph X of the petition states (R. 3):

"By reason of the premises petitioner has been deprived of his right, pursuant to said Agreement, to continue in the active service of defendant as a locomotive engineer since December 30, 1954. . . ."

This is still his position. The collective bargaining Agreement is the product of negotiation. Some things are reserved while others are conceded as a quid pro quo for rights and benefits given in return. The sole question in this case has been whether the Chief Surgeon's findings are reviewable by a three-doctor board arbitration or are limited by the seniority and discharge-for-cause provisions of the Agreement. The Petitioner's attempt to inject the idea of a dispute apart from the interpretation or application of the Agreement cannot be supported. At the instance of Petitioner the Adjustment Board interpreted the Agreement as restricting the right of disqualification for physical disability only if the same was carried out in bad faith. No claim or showing of bad faith was made herein. Under Petitioner's new theory, if some action is permitted by or not restricted in the Agreement, the claim based upon interpretation may be abandoned and a limitation may thereupon be imposed on an independent "resolution of disputes" theory. For example, if the Agreement did not provide for a paid vacation or sick leave period, an employee who nevertheless wanted these features could seek to have them added to the Agreement by the Adjustment Board under the guise of settling disputes. This would circumvent the collective bargaining process. In 1959 these parties negotiated a medical arbitration provision to become a part of the seniority rule (R. 17-19). If it had already become a part of the Agreement as a result of a compulsory settlement of a minor dispute, there would have been no consideration for the 1959 amendment.

An additional argument of the Petitioner, at pages 42 and 43 of his brief, is that it is improper to reject Board awards which are too vague or indefinite or of insufficient finality. The Petitioner's first enforcement suit on the Award of October 2, 1956, (R. 5-8) is cited as having re-

sulted in unwarranted rejection in this manner. *Gunther v. San Diego & A. E. Ry.*, 161 F. Supp. 295 (S.D. Cal. 1958). If this is a valid argument in the instant situation, the Petitioner should have appealed from that judgment. Since the October 8, 1958, "Interpretation" and order (R. 9-11) was issued and in the hands of Petitioner before entry of the judgment in the first *Gunther* case on April 8, 1959 (R. 24), there is every reason to hold that the former suit is decisive of the case at bar under the doctrine of res judicata. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Angel v. Bullington*, 330 U.S. 183, 193 (1947); and 6 *Moore's Federal Practice*, 2d Ed., p. 2258. SD&AE raised this point by its first motion in the District Court and it was denied on March 27, 1961 (R. 24-31). The proceedings had been stayed on Petitioner's motion on July 14, 1958, until February 16, 1959, to give him the opportunity to obtain an interpretation of Award 17646 or a supplemental award from the Adjustment Board (R. 56, 25). Nevertheless the "Interpretation" (second) Award 17646 was not presented to the District Court prior to final judgment or at all until September 26, 1960, when the instant petition was filed. If the award in the first case was vague or indefinite as he contends, Petitioner had more than five months' time remaining in those proceedings during which he could have removed any such infirmity by introducing the Interpretation.

In this case the question is not whether an award should be enforced despite the Board's use of some inept or uncertain terms. The instant award clearly interprets the Agreement (R. 6) and declares the issue to be the good faith of the carrier. Then in an apparent effort to delegate the responsibility for decision, the Board submits a different question—physical condition as it was two years earlier—to a three-doctor arbitration panel. The statute declares that the findings of the Board are to be prima facie evidence

of the facts stated therein. (45 U.S.C. § 153, First (p)). The dispute here was whether the Agreement limited SD&AE's right to rely on the Chief Surgeon's disqualification of Petitioner. The facts stated in the award are that it did not so limit SD&AE provided that the action and reliance were in good faith; otherwise there was a wrongful removal from service (R. 6). These findings of fact are not vague or uncertain. Since the statute gives them efficacy, they should be recognized as the proper interpretation of the Agreement. The order is simply a form incorporating the findings (R. 8, 11). The additional fact, viz. the finding of a three-doctor arbitration panel that Petitioner had no disqualifying defects, cannot be given weight under the statute because that fact is immaterial to the interpretation of the Board. Even if it had been a material fact, the Board exceeded its jurisdiction in substituting arbitration for the Chief Surgeon's determination.<sup>10</sup> The decisions of the Courts below were correct in rejecting the Board's attempt to remodel the agreement of the parties.

Petitioner's reference to *Hodges v. Atlantic Coast Line R.R.*, 310 F.2d 438 (5th Cir. 1962), (Pet. Br. 43), indicates that the Court of Appeals reversed the dismissal of a petition to enforce a board award requiring a three-doctor panel, stating that it was error to dismiss the case outright for lack of definiteness. The *Hodges* case was cited in the Petition for a Writ of Certiorari (in the case at bar) as being in conflict with the decision of the Court of Appeals for the Ninth Circuit below. The circumstances of the two cases are different. The District Court dismissed the *Hodges*

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10. Petitioner's comment that SD&AE "acquiesced in the Board's first order by participating in the selection of a three-physician board" (Pet. Br. p. 54) would not suffice to deprive SD&AE of its statutory right to judicial review of the Board award under Section 3, First (p) R.L.A., *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. 1941), aff'd by an equally divided Court in 319 U.S. 732.

petition under FRCP Rule 12(b)(1) because the award did not deny or sustain a claim (199 F.Supp. 794,—N.D. Ga., Newman Div., 1961). There were no affidavits or exhibits and the court acted on the complaint and annexed award. The first *Gunther* case (161 F. Supp. 295) also consisted of the petition and annexed award but the similarity between the two cases ends at that point. In the first *Gunther* case, the Petitioner requested and was given a delay in the summary judgment proceedings from July 15, 1958 to March of 1959 in which to obtain an "Interpretation" or supplemental award (R. 56). The "Interpretation" was issued October 8, 1958 (R. 9-11). While it was not submitted to the Court in the ensuing five-month period, the circumstances show that Petitioner himself is estopped to claim that the October 2, 1956 award was definite enough for enforcement. In any event, there was no appeal from the Judgment of April 8, 1959.

There are more basic differences between the case at bar and *Hodges* (310 F.2d 438), *supra*. Foremost is the fact that the Adjustment Board in *Hodges* interpreted the collective bargaining agreement as having been violated when the claimant was withheld from service (310 F.2d 441) (Footnote 4). Noting that *Hodges* had never had a physical examination to establish a date from which to assess a back pay penalty, the Board ordered a physical examination with an appeal to a three-doctor arbitration panel. In *Gunther*, the Board made no determination that SD&AE had violated the Agreement. No claim of bad faith was ever made or found by the Board or asserted by Petitioner in the courts below. There was no Agreement violation, and the case is not similar to *Hodges*. A glance at the quotation from *Hodges* (Pet. Br. 44) will disclose that the Court ordered the effectuation of "medical examina-

tions for use by the Adjustment Board". Even if the Court was correct, the quotation does not provide for the substitution of the judgment of the medical arbitration panel for that of the Adjustment Board.

The Court of Appeals in *Hodges* simply required the parties to comply with an order for a medical examination "for use by the Adjustment Board", saying (310 F.2d 438, 443, 444):

"... Again, without indicating any prejudgment, it was certainly permissible for the Adjustment Board to determine physical fitness and utilize medical experts making up the equivalent of a medical arbitration decision. But we do not think that, in the absence of contract provisions establishing such a scheme, the Railway Labor Act has allowed the Adjustment Board by the provisions of an award to commit the ultimate decision of the case to such an outside agency."

"... Such a procedure also assures that when and as the medical arbitration report is evaluated and applied by the Adjustment Board, the enforcing court can then determine the validity of the award based in part on such report. Thus, this determination may include questions whether the underlying collective bargaining agreement either restricts the carrier in the discharge of employees for suspected physical unfitness or the means by which management decision is to be determined or tested. After many years of juridical travail, that was the end result in *Gunther v. San Diego & Arizona Eastern Ry.*, supra, in the final decision. D.C., 198 F. Supp. 402."

It is clear that the *Hodges* case does not decide any issue pertinent to the instant case.

Similarly, the case of *Kirby v. Pennsylvania R.R.*, 188 F.2d 793 (3rd Cir. 1951), is referred to by Petitioner as being receptive to the enforcement of vague or indefinite

Board awards. But unlike the award in the case at bar the Kirby award contained a finding "that defendant violated the rules agreement" (188 F.2d 795). The Court continued on page 796 as follows:

"... But it [Congress] has protected the party who lost before the Board from having unfair advantage taken of him by making the findings of the Board prima facie only. The loser must go forward with attacking proof; but the facts are not conclusively established by the findings."

In *Railroad Yardmasters v. Indiana Harbor Belt R.R.*, 166 F.2d 326, 329 (7th Cir. 1948), the court affirmed the lower court's dismissal of an enforcement proceeding under Section 3, First (p) of the Act on two grounds, one of which was that "there are no facts disclosed in these so-called findings upon which an award could be based." The claim was that two yardmen had been improperly granted seniority rights, thus depriving two regular yardmasters of their standing. At page 330, the court declared:

"We are of the view that it cannot reasonably be held that the award and findings in the instant case are sufficiently definite and certain as to make a prima facie case in favor of the plaintiff. *Plaintiff necessarily cannot rely upon the findings and award but must offer additional proof in support of the allegations of its bill.*" (Emphasis added.)

### III. Petitioner Cannot Ignore the Basic Difference Between Consensual Arbitration and the Statutory Provisions for the Enforcement of Board Awards.

Commencing at page 37 of his brief, Petitioner argues that recent Supreme Court decisions beginning with *Textile workers v. Lincoln Mills*, 353 U.S. 448 (1957), have established rules of law which, applied to the facts of this case,

require reversal of the judgments below and remand to the District Court for the trial "de novo" provided for by Section 3, First (p), of the Railway Labor Act (45 U.S.C. § 153, First (p))—reproduced in App. A to Pet. Br., pp. xv-xvi).

It is further his position that pursuant to the federal law the Adjustment Board findings are to be equated to those of an arbitration board established specifically by the parties in collective bargaining to fully and finally resolve all disputes under an agreement which includes a no-strike clause. At page 52 of his brief, Petitioner concludes that under the applicable federal law this enforcement action is based upon the Congressional mandate contained in Section 3, First (p), "... on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated" and the decisions of this Court commonly referred to as the Steelworkers Trilogy.<sup>11</sup> His conclusion is that when the findings of the Adjustment Board are thus applied, the trial "de novo" would be limited to the determination "on the basis of the evidence adduced, whether as of December 30, 1954, Petitioner was physically qualified to perform the duties which SD&AE required of its locomotive engineers" (Pet. Br. 55).

The thrust of Petitioner's argument is that the findings and order in the instant case should be accorded the most favorable features of Section 3, First (p), and of consensual arbitration.

Whatever intendments are indulged in favor of arbitration awards, the statutory procedure under Section 3, First

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11. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

(p), must be respected to protect the rights of the parties and should be distinguished from arbitration under Sections 7, 8 and 9 of the Railway Labor Act (45 U.S.C. §§ 157, 158, 159) which demonstrate a Congressional intent to provide an entirely different scheme for resolving disputes from the procedure in Section 3, First (p).

In *Brotherhood, etc. v. Atlantic Coast Line R.R.*, 253 F.2d 753, 757-58, Chief Judge Parker of the Fourth Circuit, said:

"If it had been intended, as appellant argues, that the orders of the Board rendered pursuant to 45 U.S.C.A. § 153 should have the effect of awards of arbitrators, some such provisions as are contained in 45 U.S.C.A. §§ 158 and 159 which relate to arbitration under 45 U.S.C.A. § 157, would have been provided for their enforcement. The fact that an entirely different provision was made for the enforcement of Board orders under section 153 from that made for enforcement of arbitration awards entered under the existing statute relating to arbitration is a matter which cannot be ignored and which shows clearly that Congress did not intend Board orders to have the effect of arbitration awards."

It is clear that the statutory enforcement procedure is an integral part of the entire statutory process of Section 3, First. In *Washington Terminal Co. v. Boswell*, 124 F.2d 235 (D.C. 1941) (per Rutledge, J.), affirmed by an equally divided Court in 319 U.S. 732, the Court stated (p. 242):

"The entire statutory process has three distinct and primary stages: (1) direct negotiation between the disputants; (2) administrative determination; (3) judicial enforcement. While these are distinct, they are not independent. Each is related to the others as links in a chain or successive steps in a stairway leading to decision."

The Court continued (p. 246):

"In all this there is no essential unfairness. Certainly there is none beyond the power of Congress to create in the regulation of such complex economic matters. The carrier is at full liberty to accept and comply with the award, or to reject and disregard it. If it chooses the latter course, the award has no effect upon its rights unless the employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit."

Similarly in *Union Pacific R.R. v. Price*, 360 U.S. 601 (1959), this Court discussed the contention that since an employee who loses before the Adjustment Board cannot obtain statutory review, he should not be required to submit to the review provided in the Act if he prevails. The Court answered this question as follows (pp. 615-616):

"... The disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought be removed."

The Supreme Court continued (pp. 616-617):

"... the statutory scheme cannot realistically be squared with the contention that Congress did not purpose to foreclose litigation in the courts over grievances submitted to and disposed of by the Board, past the action under § 3 First (p) authorized against the noncomplying carrier, see *Washington Terminal Co. v. Boswell*, 75 U.S. App. D.C. 1, 124 F.2d 235, *aff'd.* by an equally divided Court, 319 U.S. 732, or the review sought of an award claimed to result from a denial of due process of law, see *Ellerd v. Southern Pacific R. Co.*, 241 F.2d 541; *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F.2d 579, 582. So far as appears, all of the Courts of Appeals and District Courts which have dealt with this problem have reached the conclusion we reach here."

In considering the availability of remedies to the parties in light of the foregoing, it should be noted that the *Washington Terminal* case, 124 F.2d 235, *supra*, rejected the application of the railroad for declaratory relief pending the availability to the employee of an enforcement proceeding under Section 3, First (p). Furthermore, a discharged employee has the right to treat his employment relationship as ended and sue for breach of contract as an alternative to pursuit of the Adjustment Board remedy under Section 3, First (i). *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953). It has not been established that any similar remedy is available to railroads.

The cases cited by Petitioner involve the enforcement of agreements to arbitrate under Section 301 of the Labor Management Relations Act, 1947 (29 U.S.C. § 185). This is a very different matter than the enforcement of awards under Section 3 of the Railway Labor Act. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), cited by Petitioner in this context, involved a non-railroad collective bargaining agreement containing a no-strike clause and a grievance procedure culminating in the arbitration of disputes. Suit was brought by the union under Section 301 of the Labor Management Relations Act, 1947 (29 U.S.C. § 185), to compel arbitration. This Court held that an agreement to arbitrate disputes when contained in the collective bargaining agreement should be specifically enforced. The common-law rule against the enforcement of executory agreements to arbitrate was rejected. The provisions of Section 7 of the Norris-LaGuardia Act (29 U.S.C. § 101, et seq.), were held inapplicable because the Congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes was clear. The policy was reiterated in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *supra*, another case involving a suit to compel arbitration of

a grievance under Section 301(a), Labor Management Relations Act, 1947 (29 U.S.C. § 185). The Court held that in a suit under Section 301(a), judicial inquiry must be confined to the question whether the reluctant party did agree to arbitrate the grievance or gave power to the arbitrator to make the award, with doubts being resolved in favor of coverage. This Court said: "*For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.*" (363 U.S. 574, 582.) (Emphasis added.) Two other similar cases mentioned above are *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960), and *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), both of which likewise deal with the federal policy in connection with arbitration in the non-railroad field. The *Enterprise Corp.* case held that it is improper for courts to review the merits of an award under an arbitration agreement, and the following general discussion appears at 363 U.S. 597:

"... Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

Even where the parties have consented to arbitration, the award cannot exceed the proper bounds of interpretation and application of the collective bargaining agreement. If it does the courts will not enforce the award in a Section 301 (L.M.R.A.) case.

At page 51 of his brief, Petitioner discusses the attempt to extend to suits under Section 301, L.M.R.A., the rationale

of two cases involving railroad employees, *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941), and *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953), so that state law would control suits for severance pay. In *Republic Steel Corp. v. Maddox*, 13 L.Ed. 2d 580, 582-83 (1965), this Court renounced such an extension, pointing out that even in the *Moore* and *Koppal* cases it is the federal law rather than state law which requires compliance with the grievance procedures. It should be noted that the *Moore* and *Koppal* cases were not enforcement suits under Section 3 of the R.L.A. The *Maddox* case holds that the application of federal law to severance claims in Section 301(a), L.M.R.A. cases requires the exhaustion of the grievance procedures under the contract, including agreed arbitration.

Petitioner cites an airline case, *Machinists v. Central Airlines*, 372 U.S. 682 (1963), which, like the Section 301 cases, concerns an agreed arbitration provision under Section 184, R.L.A. The air carriers are subject to the Railway Labor Act, but are excepted from Section 3 which deals with the Adjustment Board (372 U.S. 685). The Section 184 contract is likewise governed and enforceable by federal law rather than state law. The statutory procedure of Section 3, First, R.L.A., differs from the agreed arbitration involved in the foregoing cases. None of the cases discussed in Petitioner's brief justify or support his contention that the right and duty of SD&AE in good faith to disqualify locomotive engineers who are physically unable to discharge their duties safely was arbitrable. Federal law would not substitute arbitration provisions where none existed. The Adjustment Board does not have jurisdiction either to impose upon the parties an arbitration procedure without their consent or to delegate to others its decision-making authority.

#### IV. Recent Decisions in Railroad Cases Strongly Support the Judgments Below.

At page 40, Petitioner alludes to the question of review of the instant award in light of the decision in *Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33 (1963) which dealt with the review aspects of money awards. This proceeding is predicated on Section 3, First (p), by the Petition herein. It is not urged herein that a trial "de novo" should be refused. Petitioner would limit the trial, however, by his contention, discussed above, that the probative value of the Board's findings should preclude determination by the court of the "underlying rights and duties of the parties". He states that evidence should be adduced to determine "whether, as of December 30, 1954, petitioner was physically qualified to perform the duties which SD&AE required of its locomotive engineers" (Pet. Br. p. 55). In any event the demand for back pay herein represents a claim for money for each day in which Petitioner considers himself improperly withheld from service as a locomotive engineer. This is precisely the same as a claim of an engineer for a "runaround" (error of the railroad in calling someone else for service when a particular engineer had a prior right to be called to perform the same service). Such a claim would also be for money each day in which the engineer was similarly not called for service. There is a striking similarity between the instant award in its present posture and the award in *Locomotive Eng'rs v. Louisville & N. R.R.*, 373 U.S. 33 (1963), mentioned above. In that case, as in this one, the locomotive engineer's claim was that he was wrongfully withheld from service; and he demanded reinstatement with back pay. There, he had been reinstated and the remaining claim was for money. Here, he was entitled to reinstatement if he had simply requested examination by the three-doctor arbitration panel adopted in his Agreement in 1959 and satisfactorily passed the physical exami-

nation thereunder (R. 17-19). Yet, the record contains no indication that he ever requested or demanded such an arbitration. It is his own failure to seek reinstatement under that Agreement provision which has kept him out of active service if he is correct in saying that it would be safe for him to operate locomotives in his physical condition at the particular time. This is true despite the continuance of the instant enforcement suit, which refers to the integrity of the Chief Surgeon's decision of 1954.

The right of Petitioner to seek redress for any improper failure of SD&AE to return him to service was altered by agreement of the parties to adopt the 1959 provision for a three-doctor panel. Both the SD&AE and Mr. Gunther are bound by the new provision which actually amounts to an addition to the grievance procedure under the applicable contract. He has failed to exhaust that procedure in relation to any claim on his part of wrongful prevention from return to active service. The pendency of the instant suit, relating to the time before this grievance procedure was in effect, does not distinguish his position as an engineer under the Agreement from the situation where he had been reinstated in settlement of this suit and thereafter in 1959 (after the effective date of the provision for arbitration) had again failed a routine examination by the Chief Surgeon. He would have to exhaust the grievance procedure. *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953); *Barker v. Southern Pac. Co.*, 214 F.2d 918 (9th Cir. 1954). This he did not do. The foregoing is a complete defense to the instant case—at least with respect to the period since 1959.

The *Gunther* award is likewise similar in many respects to the recent case entitled *Russ v. Southern Ry.*, 334 F.2d 224 (6th Cir. 1964). *cert. denied*, 379 U.S. 991, *rehearing denied* in 380 U.S. 938. In that case the Court of Appeals

reversed the District Court's order of enforcement of an Adjustment Board award which had found that a locomotive engineer should be reinstated and paid for time lost. At page 227, the Court stated:

"An award which does not contain an order for the payment of money is final and binding on both parties to a dispute. *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33, 40, 83 S.Ct. 1059, 10 L.Ed.2d 172; *Brotherhood of R.R. Trainmen v. Chicago R. & I.R. Co.*, 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed.2d 622.

"It is clear, however, from the express language of the statute, that money awards of the Board are not final and binding, but the railroad may appeal therefrom to the District Court and obtain a de novo hearing. *Washington Terminal Co. v. Boswell*, 75 U.S.App. D.C. 1, 124 F.2d 235, affirmed by a divided Court in 319 U.S. 732, 63 S.Ct. 1430, 87 L.Ed. 1694; . . ."

At page 228 the Court continued:

"We find nothing in the agreement or in the Act which limited the right of the railroad to discharge an employee for cause. In the absence of a statute or an agreement, an employer may discharge his employee for cause or without cause. Violation of a rule certainly justified a discharge even for cause. 56 C.J.S. *Master and Servant* § 28(49) p. 219.

"The Board would not be justified in ordering reinstatement without a finding that the discharge was wrongful, *Thomas v. New York, Chicago & St. L. R. Co.*, *supra*; *Tinnon v. Missouri Pacific R. Co.*, 282 F.2d 773 (C.A.8).

"The Board made no such finding here."

See, in accord, *Brotherhood of Railroad Trainmen v. Louisville & N. R. Co.*, 334 F.2d 79 (5th Cir. 1964), *cert. denied*, 379 U.S. 915 (1965), *rehearing denied*, 379 U.S. 986 (1965).

**V. The District Court's Denial of Relief Under FRCP Rule 60(b) Was Proper.**

There was no abuse of discretion in the District Court's refusal to reopen the judgment some eight months after its entry. The District Court's opinion denying the motion shows that every reasonable consideration was given to the motion (R. 207-218). The order was dated April 10, 1963 (R. 218-219). The pertinent facts are set forth above in Respondent's statement of the case.

As Petitioner states at page 56 of his brief, the evidence sought to be introduced consists of certain letters written in 1944 and 1947, which he now asserts had the effect of amending the Agreement to provide for a three-doctor medical arbitration review of the Chief Surgeon as to the physical fitness of locomotive engineers to continue in active service (R. 143). The letters provide that the interpretation of rules in the BofLE Agreement with Southern Pacific Company covering locomotive engineers will apply to "similarly worded rules" in the BofLE Agreement with SD&AE, but no such latter rules were shown to exist (R. 216-217). No "similarly worded rules" were shown to exist in the printed booklet Agreement of 1938 (green cover; R. 15—documentary exhibit attached to page 266 of original record) (R. 210, 215). Furthermore, Mr. Colyar, General Chairman of BofLE, to whose affidavit Petitioner refers, declares that each time the Agreement is printed it includes all of the intermediate letter agreements and understandings since the last printing (R. 106-107). The next subsequent printing after 1938 was two years after Mr. Gunther's disqualification, viz. 1956, when an orange-covered booklet was printed (R. 215). This printed Agreement did not contain the alleged rule for a three-doctor arbitration panel (R. 215). The Court asked counsel for Petitioner why the

rule was not in the printed Agreement of 1956, and the reply was that "A reasonable inference to be drawn for its omission from the orange-covered booklet as of January 1, 1956, is that it was inadvertently omitted by those charged with the responsibility of seeing that all existing contractual provisions were incorporated there" (R. 215). The evidence of record, however, affirmatively shows that those charged with this responsibility comprehended its absence from the Agreement (R. 194-203). Mr. Colyar himself was the author of the 1955 letter to SD&AE (R. 194-203) proposing the reprint which became effective in 1956 (orange-covered booklet) and advising that the Agreement should be brought up to date and detailing the interim settlements since 1938 (R. 195). Article 35 is the seniority rule in the Agreement to which the three-doctor arbitration panel was added in 1959 (R. 17-19). The words "Article 35—No Change" appear in Mr. Colyar's letter of 1955 detailing the changes to be made (R. 20). This is commented upon in the affidavit of Mr. K. K. Schomp in opposition to the motion (R. 176-177). It thus appeared that the inference or supposition that the 1944-1947 letters might have been inadvertently omitted was without foundation in light of the specific facts of record.

Even if it could be contended that the proffered letters did in fact apply to a "similarly worded rule" and were inadvertently omitted, there is no basis whatever for a finding that Petitioner exercised "due diligence" in searching for them. He commenced the first action (161 F.Supp. 295) predicated upon the 1956 award in 1957 and was requested many times by the Court, prior to judgment in 1959, to bring in evidence of any restrictions on the SD&AE right to disqualify engineers for physical reasons (R. 28-30). Again in the instant action, which was filed in 1960, the Court repeatedly admonished Petitioner to introduce or

point to such evidence (R. 56, 214-215). Petitioner was thoroughly familiar with the Agreement, practices and customs and represented fellow employees in applying the Agreement (Pet. Br. 21, para. 6). Yet no effort seems to have been made to comply with the requests of the District Court over a period of years, if indeed such an Agreement provision existed. The Adjustment Board noted no such limitation in its purported award and "Interpretation" (R. 5-11). Additionally, since the BofLE has represented Mr. Gunther in this case since at least six months before it was filed in September of 1960, it is not an excuse to say that union differences kept the information away from Petitioner (R. 168-170). It should be noted that, despite all of the foregoing, there are available adequate discovery processes to develop such facts if they do exist.

It is submitted that under the circumstances the Court's discretion on the FRCP Rule 60(b) motion was properly exercised.

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below are correct and proper and should be sustained and affirmed.

Dated: October 20, 1965.

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(Appendix A follows)

## *Appendix A*

### **RAILWAY LABOR ACT, SECTION 6 (45 U.S.C. § 156)**

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."